Centerline Construction Company *and* Mid-Atlantic Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America. Case 5–CA–32001

May 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On June 30, 2005, Administrative Law Judge Joseph Gontram issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief. The Charging Party filed one cross-exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Centerline Construction Company, Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating applicants for employment concerning their affiliation with a union.

(b) Interrogating employees concerning their affiliation with a union.

(c) Threatening not to rehire employees because of their union activity.

(d) Failing and refusing to hire job applicants on the basis of their union affiliation or other protected activities.

(e) Discharging, laying off, or otherwise discriminating against any employee on the basis of the employee's union affiliation or other protected activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer immediate employment to Hally Ashby and Roy Friend Jr. without prejudice to their seniority or any other rights or privileges they would have enjoyed had the Respondent hired them when they applied. If the positions for which these discriminatees should have been hired no longer exist, the Respondent shall offer them immediate employment in a substantially equivalent position without prejudice to their seniority or any other rights or privileges they would have enjoyed had the Respondent hired them when they applied.

(b) Make Hally Ashby and Roy Friend Jr. whole for any loss of earnings and other benefits suffered as a re-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also contends that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

Member Schaumber does not agree with the weight given by the judge to certain of the facts on which he relied as a basis for discrediting Field Superintendent Donald Jones. He nevertheless agrees that there is no basis for overruling that credibility resolution under *Standard Dry Wall*, supra.

[2] In adopting the judge's finding that the Respondent unlawfully laid off employee Johnny Terrones from the Greater Baltimore Medical Center jobsite, we find it unnecessary to rely on the judge's finding that the Respondent departed from a past practice of reviewing a list of all employees assigned to a job to identify employees to be laid off from that job.

No exceptions were filed to the judge's dismissal of the complaint allegation that the Respondent unlawfully failed and refused to hire applicant Edward Slaten.

Given our decision to adopt the judge's unfair labor practice findings, we find it unnecessary to pass on the Charging Party's exception.

Member Schaumber does not pass on whether the judge correctly found that the Respondent coercively interrogated applicant Roy Friend because that finding is cumulative of other violations found and would not materially affect the remedy.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by refusing to hire applicant Hally Ashby, Member Schaumber does not rely on any implication in the judge's decision that the Respondent could not reasonably consider an applicant's enthusiasm for the job as an important hiring criteria for a drywall mechanic position. He agrees, however, with the judge's finding that the Respondent failed to show that it would not have hired Ashby, even in the absence of her union activity, because of her asserted lack of enthusiasm.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by refusing to hire Friend, Member Schaumber does not rely on the judge's finding that Friend would not have refused an offer of employment because he was a "salt" or the judge's opinion of the inherent probability that a salt would refuse such an offer. He affirms the judge's finding that the Respondent never offered Friend a job for the additional reasons stated by the judge in his decision.

[3] We shall modify the judge's recommended Order to conform to his unfair labor practice findings. We shall also substitute a new notice.

sult of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Hally Ashby and Roy Friend Jr. and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(d) Within 14 days from the date of this Order, offer Johnny Terrones full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Johnny Terrones whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff of Johnny Terrones and, within 3 days thereafter, notify him in writing that this has been done and that the layoff will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Baltimore, Maryland, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2004.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 31, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire job applicants on the basis of their union affiliation or other protected activity.

WE WILL NOT discharge, layoff, or otherwise discriminate against any employee on the basis of the employee's union affiliation or other protected activity.

WE WILL NOT question applicants for employment or employees concerning their affiliation with Mid-Atlantic Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, or any other labor organization.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT threaten not to rehire employees because of their union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer immediate employment to Hally Ashby and Roy Friend Jr. to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

WE WILL make Hally Ashby and Roy Friend Jr. whole for any loss of earnings and other benefits suffered as a result of our unlawful failure and refusal to hire them, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful failure and refusal to hire Hally Ashby and Roy Friend Jr. and, WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the failure and refusal to hire them will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Johnny Terrones full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Johnny Terrones whole for any loss of earnings and other benefits suffered as a result of his unlawful layoff, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of Johnny Terrones and, WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the layoff will not be used against him in any way.

CENTERLINE CONSTRUCTION COMPANY

Karen Itkin Roe, Esq. and *James C. Panousos, Esq.,* for the General Counsel.

Frank L. Kollman, Esq. and *Kelly C. Hoelzer, Esq. (Kollman & Saucier),* of Baltimore, Maryland, for the Respondent.

Brian F. Quinn, Esq. (DeCarlo & Connor), of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOSEPH GONTRAM, Administrative Law Judge. This case was tried in Baltimore, Maryland, on January 12 through 14 and January 30 through February 2, 2005. The charge was filed by Mid-Atlantic Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America[1] (the Union or the Charging Party) on June 28, 2004,[2] and the complaint was issued September 29. The complaint charges that Centerline Construction Company (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating employees about their union membership, and violated Section 8(a)(3) and (1) of the Act by laying off an employee, Johnny Terrones. The complaint also charges that the Respondent violated Section 8(a)(1) and (3) by refusing to hire or consider for employment applicants Edward Slaten, Hally Ashby, and Roy Friend, because of their union affiliation and to discourage employees from engaging in concerted activities. The Respondent admits the jurisdictional allegations in the complaint and admits that the Union is a labor organization, but denies that it has committed any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION

Centerline Construction Company, a corporation, is a drywall and finishing contractor with a facility in Baltimore, Maryland. During the year before the present complaint was filed, the Respondent purchased and received at its Baltimore facility goods valued in excess of $50,000 directly from points located outside of the State of Maryland. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a commercial drywall contractor with approximately 200 employees. The Respondent's work includes framing and hanging drywall, and installing acoustical ceiling tiles, doors, frames, and other hardware. The Respondent employs individuals with a variety of skills. It employs carpenters and drywall mechanics who have experience in framing and hanging drywall and can work independently or in teams. It employs drywall finishers. The Respondent also employs helpers with various levels of experience who are learning the trade and who assist mechanics, as well as general laborers.

Mark Green is the president of the Respondent, and George Toboll is the head of field operations. Green and Toboll are

[1] The parties agreed at the hearing to amend the caption of the complaint in order to eliminate the designation of AFL–CIO for the Charging Party. This agreement was approved.

[2] All dates are in 2004, unless otherwise indicated.

[3] The General Counsel and the Charging Party have filed a joint motion to strike portions of the Respondent's brief on the ground that the brief alleges certain facts that are not in the record. This motion is denied. First, much of the alleged extraneous facts in the Respondent's brief are as much argument as improper assertions. Of course, argument is proper in a brief. Second, alerting the judge to these matters, as the parties have properly done, should eliminate the risk posed by asserting facts not found in the record.

also the owners of the Respondent. Donald Jones is the field superintendent and reports directly to Green and Toboll. Jones supervises approximately 20 foremen, and he maintains regular contact with all of the foremen by radiophone. Jones has the authority to hire and fire, or layoff, employees. Jones does all the hiring for the Respondent. Roberto Rodriguez, John Stoll, Karl Toboll (the son of George Toboll), and William Brian Truitt are foremen for the Respondent and were assigned to various jobsites during the period of time involved herein. Jennifer Almond is the Respondent's office manager.[4] Lisa Elliott is the bookkeeper. Johnny Terrones was a helper who assisted drywall mechanics in their work.

The Respondent's employees are not represented by any union or labor organization. The Union began a campaign to organize the Respondent's employees before the events in this proceeding occurred. During 2004, the campaign included holding a jobsite meeting with the Respondent's employees, as well as efforts to secure employment for union members with the Respondent.[5] During the campaign, the Union also sought to obtain information about the Respondent by sorting through items the Respondent had thrown in its trash.

Jones hires employees using various methods, including hiring workers who are referred by existing employees and foremen. The Respondent also uses newspaper advertisements, especially when hiring for government contract jobs that require workers to have citizenship. When newspaper advertisements are used, the Respondent maintains a log of persons who call in response to the ads. This log is known as the employment ad response. (GC Exhs. 52 and 53.) Generally, Almond takes the calls and reports in the log the applicant's information, such as the applicant's name, phone number, skills, and past employers. When Almond is busy, Elliott, or even the project manager, will answer the telephone calls and record the information.

Foremen will often refer to Jones workers who appear at jobsites looking for work. The foremen may provide Jones' telephone number to the worker or may call Jones directly on their NEXTEL telephone. This is an informal practice, and the extent to which the practice is followed is unclear, although Truitt testified that he always followed this practice. Under limited circumstances, a foreman can hire a worker at the jobsite with the prior approval of Jones. Such circumstances did not arise during the events in this case.

An example of the method the Respondent, through Jones, may use to hire workers who appear at a jobsite is provided by the experience of Edward Wasilewski. Wasilewski is a paid organizer for the Union, and he has been a carpenter for over 16 years. On February 16, Wasilewski appeared on a jobsite for which the Respondent was hiring. He spoke with the Respondent's foreman, Mike Till. He told Till that he could hang, frame, and finish drywall. Till said that the Respondent was hiring, but he had to talk to his boss, Donald Jones. Till asked Wasilewski additional questions while he was talking with Jones, and he finally asked Wasilewski if he could start the next day. Wasilewski replied that he could, and then they parted.

This incident demonstrates that the Respondent's foremen have the authority to interview applicants on a job where the Respondent is presently hiring, and that the foremen can convey the received information to Jones who, in turn, can give the authority to hire the worker.

The Respondent argues that Wasilewski is not credible because he is a paid union organizer and because, before the present charges were brought, Wasilewski picked through the Respondent's trash in order to discover information about the Respondent, presumably information that would be helpful to the Union's organizing efforts. Assuming that the latter allegation is true, neither of these claims, or both together, is a sufficient reason to find Wasilewski not credible. Wasilewski's status as a paid union organizer puts him in no worse a position, for credibility purposes, than the Respondent's own witnesses. And Wasilewski's attempt to discover evidence helpful to his employer's cause by looking through the Respondent's trash has not been argued to be or shown to be unlawful. Neither of these factors is sufficient reason to find Wasilewski not credible. My observation of Wasilewski at the hearing convinces me that he is a credible witness in the limited matters to which he testified.[6]

A. Hally Ashby

On February 15 and 18, 2004, the respondent placed advertisements in the Baltimore Sun *t*o hire workers for a project at National Business Park 140 ("NBP 140"), a project under a Government contract. On February 16, Hally Ashby called the Respondent's offices in response to the first advertisement and spoke with Almond. Ashby has worked as a carpenter for approximately 17 years, and she has been a member of the Union since 2000. She is able to layout, frame (including metal stud), and hang drywall, and she possesses additional carpentry skills. Ashby was out of work at the time and she credibly testified that she was looking for employment and would have accepted employment at the Respondent if it had been offered.[7]

[4] The Respondent has admitted that Rodriguez, Stoll, Toboll, and Truitt are supervisors under Sec. 2(11) of the Act, and that Almond is an agent under Sec. 2(13).

[5] The applicants for employment who are involved in this proceeding denied that they were part of any Union plan to "salt" the Respondent's work force. Nevertheless, it is reasonable to infer that the Union supported the efforts of members to obtain employment at the Respondent during the organizing campaign. Moreover, applicant Hally Ashby admitted that a union official, George Eisner, suggested to her that she should again call the Respondent for work after she had already called the Respondent without being hired.

[6] This finding excludes Wasilewski's testimony regarding his observation of Rodriguez during the Union's meeting with the Respondent's workers on March 16. As noted below, the testimonies of Wasilewski and Terrones concerning the location of Rodriguez during that meeting conflict in certain respects. Moreover, whether Rodriguez was present to observe the meeting is not without doubt. Because Rodriguez' alleged observation of the meeting is not charged as an offense and is unnecessary to the resolution of any material fact, no finding regarding that matter has been made.

[7] The Respondent argues that Ashby was encouraged to apply for work at the Respondent by Eisner, which shows she had no intention to work for the Respondent, only to apply for work. This conclusion is rejected. Ashby not only applied for work at the Respondent, but she also contacted several former employers and responded to other classified advertisements in the newspaper. Ashby was a credible witness,

Ashby told Almond about her skills and said she had knowledge of all phases of the work, including layout, studding, and hanging the drywall. Almond asked Ashby about her experience, and Ashby replied that she had completed the Union's apprentice program, and she mentioned two companies for whom she had worked. Almond noted these previous employers in the employment ad response. Ashby's previous employers were union companies. Jones knew that Ashby was a union member and the Respondent has admitted that it knew. Almond told Ashby that Jones would be making calls to applicants later in the day, and he would call Ashby that afternoon. However, Jones did not call Ashby.

Throughout this conversation, Ashby did not know that Centerline was the company with whom she was speaking. At the time, Ashby was doing volunteer work at the Union, which she often did when she was out of work. The day after her conversation with Almond, Ashby spoke to George Eisner, director of organizing for the Union. She told Eisner about the newspaper advertisement to which she had replied. Eisner identified the company as the Respondent and he suggested to Ashby that she call the Company again.

The next day, February 18, Ashby again saw the advertisement in the newspaper, and she again telephoned the Respondent.[8] Ashby told the receptionist (she is not certain if the same person answered the telephone as previously) her skills and some of her previous employers. As before, the receptionist told Ashby that Jones would call her that afternoon, around 3 p.m. Also as before, Jones never called Ashby. Ashby made no further contacts with the Respondent.

The Respondent argues that Jones did not hire Ashby because she did not "sell herself" when she contacted the Respondent. Jones further explicated this phrase by saying that Ashby did not seem to be enthusiastic about the job. Jones states that Ashby's failure to sell herself when she applied for the job was the only reason he did not hire her. This argument and claim is rejected. Jones did not speak with Ashby, so he would have no direct knowledge as to whether she sold herself or was enthusiastic when she called about a job. Also, Almond did not advise Jones of Ashby's alleged lack of enthusiasm because Almond detected nothing unusual about Ashby and nothing distinctive about Ashby's personality when they spoke on the telephone. Indeed, there is no evidence that Almond even spoke to Jones about Ashby, and neither Almond nor Jones claims that she spoke to Jones about Ashby.

In addition, Jones goes so far as to say that Ashby was not even qualified for the job because of her alleged failure to sell herself. However, the employment ad response log (GC Exhs. 52, 53), which Jones and Almond use to list the skills of every applicant, contains no reference to Ashby's alleged failure to sell herself. Thus, the most important skill that an applicant is allegedly required to possess, at least according to Jones, is not listed on the form the Respondent uses to decide whether to hire an applicant. Moreover, there is no reference to any applicant's alleged ability to sell himself or herself throughout the employment ad response log that Jones and Almond keep for the Respondent. In several respects, Jones was not a credible witness, and in this regard, his statement of the reason he did not hire Ashby is prominent.

It may be that an applicant's proficiency in selling herself could be a factor in a hiring decision. But, if it were a factor, it would likely have less importance in a decision to hire a skilled mechanic, a position that requires no verbal skill, than the craft skill necessary to perform the job. Jones' claim that Ashby's (alleged) failure to sell herself was the determinative and the only reason he did not interview her and hire her is not credible and is rejected.[9]

B. Edward Slaten

Edward Slaten has been a union carpenter for 18 years. Slaten was out of work in January 2004. His union business agent, as well as his friend, told him that the Respondent was hiring. Accordingly, on January 19 at 6:30 a.m., he went to one of the Respondent's jobsites, Aberdeen High School. The Respondent argues that Slaten lied when he testified about going to the Aberdeen jobsite on January 19 and to the Abingdon jobsite on January 20. The Respondent cites the notebook kept by Slaten, which allegedly contains suspicious markings, as

and her direct testimony that she was honestly looking for work and would have accepted an offer to work at the Respondent is credited over the Respondent's conclusory argument that she was really not looking for work.

It may be that Eisner, as part of the Union's organizing efforts, wanted Ashby to apply for work at the Respondent without regard to whether she actually intended to work there; that is, that he wanted Ashby to be a "salt" and to infiltrate the ranks of employees at the Respondent. But such a supposition regarding Eisner's intention, assuming it were true, does not change the good faith intent of Ashby who was actually looking for work and would have accepted an offer to work at the Respondent if such an offer had been made.

[8] Ashby testified that she called the Respondent for the second time on February 18. The Respondent's employment ad response (GC Exh. 52), while somewhat less than clear, seems to indicate that Ashby's second call may have been on February 26. However, Almond did not attempt to explain the apparent discrepancy in these dates, either in her testimony or her affidavit. (See CP Exh. 2.) Indeed, Almond recalled having only one conversation with Ashby and she only confirmed the February 26 date because it was written in the employment ad response. (Tr. 1057.) However, the Respondent does not deny that Ashby called its offices twice in response to the advertisements. Ashby was a credible witness, and she explained how she recalled the date of her second call to the Respondent, viz., the day of the second advertisement and after she had spoken to Eisner. Accordingly, I credit Ashby's testimony that she called the Respondent twice in response to advertisements for employment, and that these calls and conversations occurred on February 16 (the day after the first newspaper advertisement, which was on a Sunday) and February 18, the day of the second newspaper advertisement. However, whether the second call occurred on February 18 or February 26 does not affect the factual determination of what occurred during the telephone conversations.

[9] Jones' credibility suffers further from his refusal to agree that Ashby was qualified for the drywall mechanic's position, and that the reason she was not qualified was because of her (alleged) failure to sell herself for the position. If, indeed, selling oneself for the position was a qualifying "skill," the Respondent failed to mention this sine qua non in its newspaper advertisements or in any other documents. In fact, self-promotion was not such an important and determinative skill for the position.

support for its claim, together with the testimony of Rodriguez and Truitt (the foremen Slaten allegedly spoke to) who could not recall speaking to Slaten. Although the notebook offers little support for Slaten's testimony, I find, based on the witnesses' demeanor and the likelihood that Rodriguez and Truitt would be unable to recall such a common and distant incident, that Slaten did go to the jobsites as he testified.

Slaten was a bona fide applicant for a job, and his primary intention in applying for a job with the Respondent was to obtain work. The Respondent does not dispute that Slaten was qualified for a position as a drywall mechanic.

When Slaten went to the Aberdeen High School jobsite, he wore clothing bearing the Union's logo and name. He spoke with Foreman Roberto Rodriguez for approximately 10–15 minutes. Rodriguez told him that Jones did the hiring, but that Jones was not on site. Slaten said he wanted to apply for a job, and he asked Rodriguez for Jones' telephone number, but Rodriguez said he did not know it. (Rodriguez was wearing a NEXTEL phone that he used to contact Jones, but he was not shown to be untruthful when he said he did not know Jones' telephone number. It was not established what telephone number or what method of contact the foremen used in contacting Jones when using the Company's NEXTEL phone nor whether the NEXTEL phone number was a restricted company line.) Slaten testified that after he told Rodriguez he wanted to apply for a job, Rodriguez said that he did not think the Respondent was hiring.

After Slaten's conversation with Rodriguez, he heard some of the workers talking about another of the Respondent's jobs, Abingdon library. Accordingly, the next day, January 20 at 6:30 a.m., Slaten went to the Abingdon library jobsite. Again, he was wearing clothing bearing the Union's logo and name. He spoke with the foreman, William Bryan Truitt.[10] Slaten asked Truitt if the Respondent was hiring and if Slaten could fill out an application. Truitt asked Slaten what he could do, and Slaten began to tell Truitt about his skills.

Slaten testified that as he was telling Truitt about his skills, Truitt suddenly interrupted him and told him the Respondent was not hiring. I find that this testimony is not credible. First, it is not likely that the foreman would suddenly reverse course concerning the availability of jobs in a single conversation after he had spoken with Slaten, an obvious union adherent, about the job and had shown his interest in Slaten by asking about his skills. Truitt was certainly discerning enough to know the message that such a reversal could convey. Moreover, Slaten's union affiliation was emblazoned on his clothing and must have been apparent to Truitt from the beginning of the conversation. Thus, it is not likely that Truitt, midway through the conversation, would falsely deny the availability of jobs, at least if the motivation for such a false claim were Slaten's union affiliation. The support for this finding is compounded by the fact that Slaten made a similar claim about Rodriguez, viz., that midway through the conversation, Rodriguez suddenly said he did not think the Respondent was hiring. It may be that Slaten assumed from the comments of Rodriguez and Truitt that the Respondent was not hiring, but this impression was not conveyed directly.

Although the Respondent was hiring at other jobsites when Slaten looked for a job at Aberdeen and Abingdon, it was not hiring at either of those sites. Thus, even if Rodriguez and Truitt conveyed an impression to Slaten that the Respondent was not hiring, that impression was accurate insofar as their jobsites were concerned.

Slaten made no further contacts with the Respondent, and he made no efforts to contact Jones.

C. Roy Friend Jr.

Roy Friend Jr. has been a member of the Union for 12 years and has been a journeyman carpenter since 1997. On approximately February 16, Friend called the Respondent in response to its February 15 newspaper advertisement in the Baltimore Sun, and he spoke with a woman he believed was the receptionist. The conversation was brief. Friend explained the purpose of his call, and the receptionist asked for his name and telephone number and said that Jones would contact him by 3:30 that afternoon. Jones did return Friend's call, but not until the next morning.

Jones' conversation with Friend lasted approximately 5–10 minutes. Jones asked Friend if he was interested in a job, and he asked about Friend's experience and previous employers. Friend replied that he was interested in a job, that he had completed 4 years of apprenticeship training, and that the companies for whom he had worked included Dick Corporation and Bechtel. Jones asked if Dick Corporation was a union contractor, and Friend replied yes. Jones asked Friend to come to the Respondent's offices to fill out an application, and Friend agreed.

Although Jones admits knowing that Friend was affiliated with the Union, he denies asking Friend whether the Dick Corporation was a union company. Friend was the more credible witness regarding this exchange. Moreover, the log kept by Jones shows that he kept track of whether some applicants were affiliated with a union. For example, in the original employment ad response (EAR) log, Jones specifically noted three applicants, not including Friend, who were or had been affiliated with a union. Curiously, when Jones rewrote the log, allegedly for a different purpose, he omitted these union notations. In any event, Jones' apparent interest in applicants' union affiliations supports Friend's testimony that Jones asked Friend whether his previous employer was a union company.

[10] The Respondent presented testimony from various witnesses that Truitt is known to his coworkers as Bryan, not William, and that Truitt uses his first name only in formal documents, such as payroll. The Respondent further argues that Slaten's use of William when identifying Truitt shows that Slaten did not meet with Truitt on January, but rather that Slaten obtained Truitt's name from some formal company document that the Union may have uncovered from the Respondent's trash. I am unwilling to make the several assumptions and inferences necessary to arrive at the Respondent's conclusion. The evidence shows that Truitt did use "William" in less formal circumstances than payroll, such as, at least, a time sheet that all workers complete for time spent on a job. Moreover, it is certainly possible that Truitt would use "William" when speaking with a stranger or an applicant for a job. Also, Truitt did not provide any testimony on the issue. For all of these reasons, Slaten's reference to Truitt as "William" is not sufficient to conclude that Slaten did not meet with Truitt on January 20 at the Abingdon library jobsite.

Later in the day after Jones and Friend had their telephone conversation, Friend went to the Respondent's offices. He spoke to the receptionist who gave him papers to complete. The papers included an application for employment and tax withholding certificates for the Federal and State Governments. Friend filled out the papers and handed them to the receptionist, who told him that Jones would contact him about the job.

Several days later, after Jones had failed to call him about the job, Friend called the Respondent's offices. Friend again spoke with the receptionist who told him that Jones would call him; however, Jones did not.

Jones and Almond testified that when Friend came to the Respondent's offices, Jones met with and interviewed Friend. Jones testified that he offered Friend a job at $17 an hour, and that Friend replied he would let Jones know. Almond testified that Friend called the office the following day and told her he would not accept the job offer because of the low pay. This testimony of Jones and Almond is not credible and is rejected.

One of the Respondent's primary contentions throughout the hearing was that the Union was attempting to organize the Respondent's employees, and accordingly, the three union applicants were not really interested in obtaining long-term employment, but rather were union "salts." Assuming that this assertion is true, Friend would not have rejected an alleged offer to work for the Respondent because of the allegedly low wage because he was not really interested in the wage. Rather, he would have been interested in "salting" the workplace, thereby furthering the Union's efforts to organize the workers. Therefore, as a "salt," Friend would not have refused an offer of a job since that would vitiate the very thing he intended to accomplish.

Moreover, Friend credibly testified that because he was out of work, he would have taken a job at the Respondent if one had been offered. Thus, whether Friend applied for work to "salt" the Respondent's work force or to obtain work for himself, it is not credible that he would have refused a job offer if one had been made. Friend denied that Jones made a job offer. Indeed, he denied that Jones even spoke to him when he came to the Respondent's offices and completed the employment application. Friend was a credible witness, and his testimony regarding his application for a job at the Respondent is credible and is accepted.

While the testimony of Jones and Almond concerning Friend's application for work was not credible, Almond was, in general, not a credible witness. For example, Almond testified that she could specifically remember that Ashby and Friend mentioned nothing about union activity when they called the Respondent's offices in February 2004 in response to the newspaper advertisement. On the other hand, Almond had no recollection whether any other caller mentioned anything about union activity. Almond also testified that she recognized Friend when she saw him during the hearing in this case in January 2005, even though she had seen him, as she testified, only momentarily in February 2004, and even though she could not describe what he looked like. Yet, Almond testified that this was the person who met with Jones in February 2004. Her testimony was not credible and she was not a credible witness.

Nevertheless, while the Respondent's conclusions are not warranted, either by the circumstances or the credible testimony of Friend and Ashby, the Respondent's factual argument that the three union applicants were salts or were, at least, encouraged by the Union to apply for a job with the Respondent has merit. Since the Union was, during the relevant time period, attempting to organize the Respondent, it is reasonable to infer that Ashby knew of that organization attempt and was just as pleased to apply for a job at the Respondent as anywhere else. Moreover, Friend had assisted the Union in its organizing efforts at the Respondent. But this makes the Respondent's contention, viz., that Friend refused the job offer because of the low pay, even more incredible. As a "salt" who could help the Union organize the Respondent's work force, as well as an unemployed worker who needed to find a job, Friend had increased incentive to accept a job offer from the Respondent.

The Respondent argues that Jones' testimony regarding meeting with Friend in the Respondent's offices is supported by the EAR log that was kept by Jones and Almond. (GC Exh. 52.) This argument is unavailing because the log is insufficient to overcome the credibility determinations that have been made concerning Friend, Jones, and Almond. Moreover, the log is untrustworthy without regard to extraneous credibility determinations.

The EAR log has a notation of "met in person" for Friend. However, that is the only time the log reflects that an applicant was met in person. The Respondent produced the log it kept from January to October 2004. The log reflects calls from approximately 75 applicants.[11] Yet the only applicant who received a notation of "met in person" is Friend.[12] Jones stated that he personally meets with applicants, and that the meetings are generally held in the office, but occasionally are held at a worksite if the location of the worksite is more convenient. The singular notation of "met in person" for a union applicant who the Respondent admits knowing was associated with the Union is suspicious and does not support the contention that Jones personally met with Friend.

Moreover, the log reflects various applicants who were offered a job, but who failed to show up for work. For these applicants, the log contains the notation "no show." However, there is no notation for Friend, such as "no show" or "refused offer" or any other notation to reflect his alleged refusal to accept a job offer. If the Respondent documents some applicants who do not follow through on a job offer, it is reasonable to expect the Respondent to document all applicants who do not follow through on a job offer. To accept Jones' and Almond's testimony that Friend was offered a job, but refused the offer, demonstrates an inconsistency in the Respondent's recordkeeping that the Respondent failed to credibly explain.

The log also lists, for the most part, the jobsite to which Jones assigns an applicant. Yet, the notations on Friend contain

[11] The record is not clear that this log was complete. The findings and analysis are based only on the log produced and admitted at the hearing.

[12] One of the 75 applicants, Nathan Botwright, applied for a job in October, and the log reflects that there was a "meeting." This vague term is not otherwise explained in the log.

no reference to the jobsite to which he was supposedly assigned. For all of the foregoing reasons, the log is untrustworthy and does not support the Respondent's contention that Friend refused an alleged job offer made by Jones.

The EAR log kept by Jones and Almond is not a trustworthy document for another, and perhaps more fundamental, reason. The log is kept by Jones, Almond, and occasionally, Lisa Elliott who performs accounting services for the Respondent. Jones appears to be busy in his work. He is the Respondent's field superintendent, approximately 20 foremen report to him, he supervises the foremen and the workers under them, and he addresses all of the problems the foremen encounter on a daily basis. He has contact with many of the foremen every day through the NEXTEL phones that he and each of his foremen are issued, and he visits the various work sites. In addition, he spends approximately 3 to 4 hours each day in the office. And, as Jones testified, "We're a very busy office." (Tr. 86.)[13]

The first entries in the original EAR log are dated January 29, and there were four applicants listed for that date. (GC Exh. 53.) Jones testified that during the week of February 16, after 1-1/2 pages of the original EAR log were already completed, he noticed that four small blocks in the log did not contain sufficiently detailed information of the skills of the four January 29 applicants.[14] Instead of simply putting the necessary information (which was an applicant's skills, designated by individual letters) in the respective blocks, a fairly simple and quick matter, Jones testified that he rewrote the entire 1-1/2 pages of the log. (GC Exh. 52.) He also claimed that he obtained the particular information on the four applicants' skills by calling the applicants.

First, it is not credible that a busy executive and manager would take the time to personally rewrite a 1-1/2 page log when he could more easily have simply added several letters to four small blocks on the log. Moreover, Jones was unable to provide any reason for his curious action. When asked to explain why he would rewrite the entire document rather than record the designated letters for the four applicants' skills in the designated blocks on the form, Jones replied, "It's just what I chose to do." (Tr. 314.) Second, Jones claims that he called each of the applicants in order to obtain the necessary information. Yet, the four January 29 applicants, who are the only applicants for whom Jones felt there was insufficient information in the log, are also the only applicants in the original log's 1-1/2 pages whose telephone numbers are not listed in the log. Third, the original log reflects that the four January 29 applicants had already been hired by the Respondent when Jones rewrote it,[15] thus nullifying Jones' stated purpose in making the revised log. Since Jones had already hired these four workers, it is likely he already knew their skills, and if he did not, he or his foreman could have asked them on the job. Accordingly, it is doubtful whether Jones ever called these applicants or needed to call them. In addition, Jones was not forthright when he was first asked about the EAR log. In describing the first page of that log, which was copied (with some notable changes, such as excluding several applicants' union affiliations from the revised log) from the original log (GC Exh. 53), he indicated that he had copied the information from scraps of paper that he was carrying around the office. (Tr. 153.) Later in the hearing, and after the General Counsel produced the original log, Jones admitted that he had copied what was now recognized as a revised log (GC Exh. 52, pp. 1–2) from the original log (GC Exh. 53).

Jones' credibility as a witness is also lessened by his testimony concerning his knowledge of Friend's union affiliation. Jones was initially asked on cross-examination whether he had been aware that Friend had been affiliated with a union or had worked for a union employer. Jones responded, "No." (Tr. 107.) Jones was later asked, "Isn't it true, sir, that at the time [of Jones' interview of Friend] you had knowledge that Dick Corporation [Friend's previous employer] was a unionized corporation?" Jones responded, "No. I was unaware." (Tr. 108.)[16] Later still, and on direct examination, Jones was asked whether this testimony was "correct." Jones admitted that it was not correct, and that, in fact, he was aware Friend had worked for a union employer.

The only explanation Jones had for his previous testimony was, "I didn't know how to correct my—to retract it." (Tr. 919–920.) However, the first question is not whether Jones knew how to retract his testimony, but why he testified falsely in the first place, and indeed, testified falsely twice. Before the hearing, Jones signed an affidavit at the request of the Respondent's counsel, and stated that he knew Friend had worked for a union employer. Thus, Jones had already been asked the question by the Respondent's counsel and had given a written, signed statement under oath that he knew Friend had worked for a union employer. Under these circumstances, it is difficult to accept that the incorrect testimony was inadvertent. In any event, such testimony lessens Jones' credibility.

The Respondent argues that Friend's testimony was not credible, and it points to certain inconsistencies in Friend's notebook. Friend keeps notes on everything he does that is work- related. Friend's notes reflect that he talked to Jones on February 17 and went to the Respondent's offices the next day to complete an application. In his testimony, Friend admitted that he went to the Respondent's offices the same day he had called, February 17, not the next day. The Respondent argues that the mistaken and changed date demonstrates Friend's lack of credibility. This argument may be well taken, but only insofar as the date is otherwise important or operative. It is not. Friend could have gone to the Respondent's offices to complete an application on February 15, 16, 17, 18, or 19. (He stated that he made the notes on February 20.) The result would be the same, and what occurred when he went to the Respondent's

[13] References to the transcript of the hearing are designated as Tr.

[14] The relevant part of the log was the skills block in the rows for the four January 29 applicants.

[15] The original log reflects that the four January 29 applicants had been hired and assigned to the National Business Park 140 site. (GC Exh. 53.)

[16] Jones' complete response to the question was as follows: "No, I was unaware. I had asked Mr. Friend. I had never heard of Dick Corporation. Being inquisitive, there are so many contractors out there, and he presented me that they are from out of Pittsburgh." (Tr. 108.) Jones' admission that he had asked Friend supports the finding previously made herein that Jones asked Friend if Dick Corporation was a union contractor.

offices would not change. His credibility concerning what occurred during the application process is not affected by his apparent failure to accurately recall dates.

The Respondent also argues that Friend's notes do not contain a reference to his telephone call to the Respondent's offices several days after completing the application. Whether Friend called the Respondent after completing his application does have relevance to an important and disputed fact, viz., the Respondent's claim that Friend called the day after his application and told Almond he would not work for the offered wage. But Friend claims he called the Respondent's offices several days after the application, which is consistent with the reason for the call—to inquire whether the Respondent had decided to hire him. Moreover, a call actually made several days after the application seeking a job would not likely be confused with a purported call made the day after the application refusing a job. On balance, and considering the demeanor of Friend, Jones, and Almond, Friend's testimony regarding these events is more credible than the other version.

In conclusion, Friend and Ashby applied for work at the Respondent after the Respondent placed a newspaper advertisement for job openings. Both Friend and Ashby were out of work at the time and they were looking for work. They were also motivated to apply for work at the Respondent because of the Union's organizing efforts. The Respondent failed to return Ashby's telephone calls in which she sought to obtain a job, the Respondent did not offer Friend a job, and Friend did not refuse a job offer, much less refuse a job offer because the wage was too low.

D. Johnny Terrones

Johnny Terrones worked for the Respondent as a helper. The Respondent hired Terrones in March 2003 at the rate of $12 per hour. During his employment with the Respondent, Terrones received three pay increases, the last occurring several weeks before he was laid off in April 2004. Terrones has been a member of the Union for approximately 3 years.

The Respondent transferred or reassigned Terrones several times during his employment. Terrones' first assignment was at a museum in Baltimore. After Terrones worked at this job for about 3 months, the Respondent transferred him to another job (the Peabody job) in Baltimore. After a month at the Peabody job, Terrones and other workers were laid off for approximately 1 to 3 weeks because the work had to be checked.[17] Terrones' coworker then called Jones who told him and Terrones to report to another jobsite, which was a school in Baltimore. After Terrones worked at the school job for about 2 months, Jones transferred him to another jobsite, Mercy Hospital in Baltimore. About 3 months later, Jones transferred Terrones to a jobsite at the Greater Baltimore Medical Center (GBMC). Terrones worked at the GBMC jobsite for approximately 2 months until his layoff in April 2004. There were two foremen at the GBMC jobsite, John Stoll, who was the general foreman, and Karl Toboll. Toboll supervised between 60 and 80 workers.

1. Threatening statements by Karl Toboll

In early March, five coworkers of Terrones quit work at the GBMC jobsite. They told Terrones they were going to work for another company where they would receive better pay and benefits. The day after the workers left, Karl Toboll asked a group of workers, including Terrones, if they knew where the missing workers were. The workers with Terrones did not understand English, so Terrones answered and said that he did not know. Toboll responded with an expletive and said that he knew the workers had left to work with the union. Toboll then told Terrones that the workers "would not come back to Centerline because they work at the union now. And . . . they would never come back to Centerline because they will be put on a list." (Tr. 191–192.)

Toboll denies that he made these statements, but Toboll was not a credible witness. Toboll gave the distinct impression of someone who does not like unions or workers who are members of unions. The tone of his answers and the expressions on his face demonstrated a person who was biased and who could not be relied on to provide an accurate recounting of the events in question. As an example, Toboll was asked by the Respondent's counsel whether he knew Terrones, and he replied, "The name sounds familiar. I think so." (Tr. 781.) Yet, Toboll later professed detailed knowledge about Terrones, allegedly recalling that Terrones was often late, did not have adequate transportation to work, was a good worker, and wore a certain type of hardhat. The credibility of this apparent detailed knowledge is further diminished by the recognition that Terrones, whose position was helper, was one of approximately 60 to 80 employees supervised by Toboll on the GBMC job. In the end, one could not say whether Toboll knew Terrones at all, or knew him a little, or knew him well and in detail. Toboll was not a credible witness.

2. Interrogations by Roberto Rodriguez and John Stoll

On March 16, approximately four to five union organizers came to the GBMC jobsite. They met with the Respondent's employees in the GBMC parking lot at the end of the day. Edward Wasilewski, a union organizer, was one of the organizers at the meeting. Terrones was also present at the meeting. Terrones and Wasilewski both testified that Rodriguez openly monitored the meeting. Nevertheless, unlawful surveillance was not charged in the complaint. Moreover, the evidence is inconclusive as to whether Rodriguez did monitor the meeting.[18]

[17] The Respondent's employee information card reflects that Terrones quit on August 8, 2003, and was rehired on August 27, 2003. The Respondent did not attempt to explain what actually occurred or the apparent discrepancy between its record and Terrones' testimony. Nevertheless, whether, under these circumstances, Terrones technically quit or was laid off, appears to be a distinction without a difference. The Respondent told him why he could not work for this brief period in August 2003, and, therefore, he did not work. Terrones knew that the layoff would be brief, or until the work was checked.

[18] Terrones and Wasilewski remembered Rodriguez standing at different distances from the meeting. Wasilewski provided an affidavit to the Board in its investigation, but for some unexplained reason, the alleged events of March 16 were not included in the affidavit. Also, the Respondent's time records show that Rodriguez was assigned to the Aberdeen High School jobsite on March 16. Although this record does not conclusively prove that Rodriguez was at Aberdeen the entire day or that he could not have been asked to come over to the GBMC jobsite

Throughout most of his employment at the Respondent, Terrones would occasionally (two to four times a month) wear a T-shirt with a union logo. No manager or supervisor ever said anything to him about these shirts. Indeed, Terrones felt that management did not notice his union clothing. On or about April 22, Terrones wore a union shirt to work at the GBMC jobsite where Rodriguez and Stoll were working as foremen. During Terrones' lunch break, Francisco Velez, a finisher, came up to Terrones and asked him if he was a member of the Union. Terrones responded, "Yes." Velez then went over to Rodriguez, who was with a group of associates, and had a conversation with him. Rodriguez then approached Terrones and asked him if the shirt belonged to the Union and if Terrones was a member of the Union. Terrones again responded, "Yes." Rodriguez frowned, and then left.

The next day, Terrones came to work wearing a union T-shirt, a jacket, and a hardhat, which displayed several union stickers. He was assigned to work in the basement of the building, and as he was working Stoll approached him and asked whether the stickers on his hardhat belonged to the Union. Terrones said yes, and Stoll asked if he belonged to the Union, and Terrones again replied yes. Stoll then shook his head, but did not reply.

Stoll and Rodriguez deny questioning Terrones about his union clothing or his union membership. Stoll and Rodriguez also denied seeing any workers, including Terrones, wearing union clothing on the GBMC jobsite or at any time.

Assuming that Rodriguez and Stoll were truthful in their failure to recall ever seeing an employee, including Terrones, wearing union clothing on one of the Respondent's jobsites, the likelihood that they questioned Terrones on April 22 about his union clothing is increased. It is more probable they would have questioned Terrones the first time they saw him wearing union clothing, on April 22 and 23, and especially in light of Terrones' 13-month employment with the Respondent, than if they had seen Terrones wearing such clothing in the past. Of course, the preliminary question is whether Rodriguez and Stoll observed Terrones wearing union clothing on April 22 and 23, but this question has already been answered affirmatively in the above findings. Terrones was a credible witness, and his specific recollection that he wore the union shirt and hardhat, and his recounting of Rodriguez' and Stoll's comments about his union membership, is more credible, under all the circumstances, than Rodriguez' and Stoll's denials.

Moreover, the Union was attempting to organize the Respondent's workers at the time of Rodriguez' and Stoll's comments to Terrones. Indeed, the Union's March 16 presence on the jobsite with approximately five organizers indicates that its campaign was intensifying. In light of that attempted organization, the Respondent's foremen would likely be more interested in knowing whether a worker was a member of the Union than if union organizing activity was not occurring. The disapproving facial expressions of Rodriguez and Stoll after Terrones acknowledged being a member of the Union are also consistent with the Respondent's interest.

The Respondent argues that Terrones should not be believed and it points to alleged inconsistencies between Terrones' affidavit to the Board and his testimony. For example, Terrones testified that he talked with Stoll "about one hour before we would leave." (Tr. 209.) In his affidavit, Terrones stated that the conversation took place before lunch at about 11:30 a.m. These statements are not necessarily inconsistent[19] nor, if they were, do they seriously undermine Terrones' credibility concerning Rodriguez' and Stoll's comments on April 22 and 23.

3. Layoff of Johnny Terrones

Approximately April 19, Terrones told Stoll he needed to take some time off in the upcoming weeks for the birth of his child. Stoll replied that this would not be a problem, and if Terrones had to miss work he could take time off and call Stoll when he came back. (Tr. 211.) Accordingly, Terrones missed several days of work between April 19 and 26. On April 26, Terrones' baby was born, and he called Stoll to say he would not be in work that day. Stoll congratulated him and approved his absence.

During his employment at the Respondent, Terrones was absent from work on other occasions. On these occasions, he notified the foreman or Jones of his expected absence. For example, in August 2003, Terrones told Jones that he was unable to get transportation to work for 2 weeks. Jones accepted this explanation and put Terrones back to work upon his return. There are no written notations in the Respondent's records detailing or describing or referencing any alleged absences or lateness by Terrones. Nor are there any records relating to discipline of Terrones for attendance problems or issues.

In April, Jones and Stoll met for the purpose of determining whom to lay off at the GBMC jobsite. The Respondent had determined that layoffs were necessary because the manpower needs at the GBMC site had decreased. During the spring, the number of workers at the GBMC site decreased from about 77 to 40. Of the 37 workers who left the GBMC site, approximately 15 were laid off, while the remaining workers were transferred to other jobsites.

Jones' practice in handling layoffs was to meet with the job foreman and go through the list of workers on that job to select the worker or workers for layoff. Jones would then select the workers for layoff or transfer after discussing the workers with Stoll. Neither Jones nor Stoll were able to recall the specifics of their April meeting in which Terrones was selected for layoff. However, on this occasion, Jones and Stoll met, but instead of reviewing the list of all workers on the GBMC jobsite, they just reviewed the list of workers who were working that particular day at the GBMC jobsite. Their review was limited to these workers because Stoll brought the sign-in sheet for that day to the meeting, and their review was limited to the workers on that

to observe the meeting (Rodriguez, being Hispanic, might have been better able to understand what was occurring during the meeting), the Respondent's records do cast some doubt on whether Rodriguez was present during the meeting.

[19] "One hour before we would leave" could mean an hour before lunch or an hour before any other event for which Terrones would leave the jobsite or his immediate area, including, of course, leaving at the end of the day. Exactly what Terrones meant was not pursued in further questioning.

sign-in sheet. Jones testified that he selected Terrones for layoff during this meeting.

On or about April 28, after the birth of his child, Terrones returned to work. After he arrived at the GBMC jobsite, Stoll told him that there was no more work for him and that he should call Jones in a couple of weeks to see if there was work at that time. Terrones asked for his paycheck. Stoll called the Respondent's office, and then told Terrones to go to the office and pick up his paycheck. Terrones did so, and after he arrived at the office, he spoke to Jones. Terrones asked Jones why there was no work for him. Jones did not state why, but he told Terrones to call him in a couple of weeks. Terrones then picked up his paycheck and left.

The Respondent disputes that Terrones was laid off on April 28, a Wednesday, because if that were the date of Terrones' layoff, he would not have been able to pick up his paycheck because paychecks are not available for distribution until Thursday. Whether Terrones was laid off on April 28, or shortly after or before that date, is not particularly important and does not adversely affect Terrones' credibility. Indeed, the Respondent's own records reflect that the layoff occurred on April 23 (a Friday), yet the Respondent does not consistently argue the accuracy of this date either. Moreover, Terrones does not insist that the layoff occurred precisely on April 28. In conclusion, it is sufficient if Terrones' layoff occurred on or about April 28, which is the finding made herein.

While the Respondent argues that Terrones is not credible, it does not dispute Terrones' description of what occurred when he went to the office and picked up his paycheck, with one exception. Terrones indicated that when he asked Jones if there was any work, Jones told him that he (Jones) did not want to have a fight with the Union. However, this alleged statement is not contained in Terrones' personal notes that he made after these events, nor is it contained in the affidavit Terrones provided to the Board.

I agree that the evidence is insufficient to prove that Jones made this statement to Terrones. The primary reason for this conclusion, in addition to Terrones' failure to previously record the statement, is the somewhat vague testimony Terrones gave when he described the alleged statement. Terrones stated, "And I understood he [Jones] was shaking his head saying that he didn't want to have a fight with the union." (Tr. 214.) This testimony may describe Terrones' understanding, but it does not purport to be a quote or even a paraphrase of what Jones said. Under all the circumstances, the evidence is insufficient to conclude that Jones made the questioned statement to Terrones when Terrones came to pick up his last paycheck.

Within 1 week of his layoff, Terrones called Jones and asked if there was any work for him. Jones told Terrones there was "nothing for the time being." (Tr. 217.) Terrones made no further attempt to call Jones or to obtain work at the Respondent. Although Jones testified that he did not receive a call from Terrones after he was laid off, this testimony is not credible and is not accepted. Given the number of calls Jones and his office receive from applicants and former employees looking for work, it is probable that he simply does not recall Terrones' call. Moreover, the Respondent does not seem to seriously dispute Terrones' claim that he did call Jones within 1 week after he was laid off. (See R.'s posthearing Br., p. 25.)

The Respondent maintains that Terrones was laid off because it was downsizing at the GBMC jobsite in the spring, and because Terrones had a number of absences from work throughout his tenure with the Respondent. Stoll was asked on cross-examination for the reason Terrones was laid off. He stated and repeated that the only reason for Terrones' layoff was the Respondent's need to downsize at the time. Stoll later testified on direct examination that Terrones was laid off because of his work attendance problems. The General Counsel argues that this shifting explanation shows that the explanation is not credible. Stoll's failure to mention Terrones' alleged absences when he was first asked is troubling, but it is not alone sufficient to find Stoll or his explanation incredible. According to the Respondent, if there had not been a need to downsize, the workers, including Terrones, would not have been laid off. Thus, downsizing was the first and sufficient cause to layoff workers. However, the question in this case, as the Respondent and Stoll knew, is why Terrones was selected for layoff. Stoll was less than candid in insisting on cross-examination that downsizing was the only reason for Terrones' layoff.

With respect to the Respondent's claim of downsizing, Stoll testified that during the spring of 2004, the number of workers at the GBMC jobsite decreased from about 77 to about 40. While these numbers may not be exact, the Respondent's records show that at the end of April there were approximately 40 workers at the GBMC jobsite. Of these 40 workers, approximately 12, including Terrones, were laid off at the end of April or the beginning of May. The remaining workers either were kept at the GBMC jobsite or were transferred to other jobsites.

The attendance records of the GBMC workers who were not laid off in April shows the following. (R. Exh. 22.) There are 21 such employees, and their attendance records for the period March 1 to April 18 show that the employees who were not laid off were absent for the following number of hours:[20]

No.	Name	Hours Missed	No.	Name	Hrs Missed
(1)	Mark DeCampus	27.5	(12)	Bob Vorbach	1
(2)	Hipolito Ramirez	30.5	(13)	Tron Honeyblue[21]	40
(3)	Wilde Verouquez	8	(14)	Vincente Vallejo	16
(4)	Vidal Loza Machach	0	(15)	Ray McNeil	9
(5)	Ramiro M. Santillan	0	(16)	Roberto Oldland	0
(6)	Rafael Alvarez	9	(17)	Dennis Johnson	41.5
(7)	Pablo Arispe	0	(18)	Jorge Zurita[22]	15

[20] April 18 is chosen as the ending date because the time records in evidence appear to list Terrones' attendance only for the period up to April 18, and the purpose of listing the attendance records of the employees who were not laid off is to enable the making of a comparison to Terrones. The computations in the text are based on a 40-hour week.

[21] Tron Honeyblue was laid off on May 1. He was rehired about May 23.

	Machado				
(8)	Constancio A. Machado	0	(19)	Idelfonso Mendez	8
(9)	Jorge Jimenez	32	(20)	Brian Nevil	104
(10)	Guido Torrico	9	(21)	Rolando Torrico	32
(11)	Carlos Torrico	9			

The attendance records for Terrones during this same period show that he missed 34.5 hours of work.

III. ANALYSIS

A. Section 8(a)(1) and (3)—Slaten, Ashby and Friend

1. Failure to Hire Slaten, Ashby, and Friend

To establish an unlawful refusal to hire in violation of Section 8(a)(3) of the Act, the General Counsel must prove the following: (1) the Respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced requirements of the position for hire or the requirements were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden shifts to the Respondent to show that it would not have hired the applicants even in the absence of their union affiliation. *FES*, 331 NLRB 9, 12 (2000).

The Respondent admits that it was hiring drywall framers and hangers in January and February 2004. Indeed, the newspaper advertisements placed by the Respondent in February demonstrate that it had concrete plans to hire for these positions. Moreover, the Respondent did hire numerous drywall mechanics within 30 days of its newspaper advertisements, at least five of whom were hired to perform the same work for which Ashby, Slaten, and Friend were experienced and were capable of performing.

The Respondent does not contend that Ashby, Slaten, and Friend were not qualified for the positions for which it was hiring in January, February, and March. It could hardly do so with respect to Friend because it claims to have offered Friend a job in February. Also, the Respondent stipulated at the hearing that Slaten was qualified for the positions that are involved in this case. Moreover, Ashby, Slaten, and Friend possessed similar qualifications for the position of drywall mechanic, and the Respondent's EAR log shows its notations demonstrating that Ashby possessed equal or greater drywall skills as Friend as well as other applicants that the Respondent hired in response to its advertisements.

As noted above, Jones contends that Ashby was not "qualified" for the position of drywall mechanic, not because of any lack of mechanical skills, but because of her alleged lack of enthusiasm, her alleged failure to sell herself, when she called to apply for the job. This claim is not credible and is rejected. First, it is not credible that Ashby displayed a lack of enthusiasm when she called about the job. Second, even if she did, it is not credible that Jones personally knew of or was told of her alleged lack of enthusiasm. Third, the ability of an applicant to sell himself or herself was not listed as a qualification for the job nor was it listed in any of the notes made by the Respondent pertaining to the applicants, including Ashby. This alleged qualifying characteristic, interposed by Jones at the hearing in this case, is used by Jones as a pretext for discrimination. For all of the foregoing reasons, Ashby met the objective criteria for the position for which the Respondent was hiring, and accordingly, the General Counsel met his burden of proof that Ashby was qualified. *FES*, supra at 13.

The Respondent had concrete plans to hire when Slaten, Ashby, and Friend sought positions in January and February. Ashby and Friend applied for a position in response to a newspaper advertisement by the Respondent, and the Respondent does not maintain that this element has not been met. With respect to Slaten, the Respondent did not have concrete plans to hire at the particular jobsites Slaten visited. However, the Respondent did have concrete plans to hire at other jobsites, viz., National Business Park. As noted, the Board has described this element as concrete plans to hire, and has not further limited the element, such as concrete plans to hire at a particular jobsite. Id. at 12.

The Respondent knew that Ashby, Slaten, and Friend were affiliated with the Union. The Respondent does not dispute such knowledge with respect to Ashby and Friend. Slaten appeared at two jobsites and, wearing union clothing, spoke to the Respondent's foremen at those sites. The foremen saw Slaten's union clothing and knew from the clothing that Slaten was affiliated with, or at least supported, the Union. Accordingly, the Respondent knew that Ashby, Slaten, and Friend were affiliated with the Union.

Accordingly, the Respondent had concrete plans to hire during the relevant time period; Ashby, Slaten, and Friend were qualified for the positions for which the Respondent was hiring; the Respondent was seeking and hiring applicants with skills similar to Ashby, Slaten, and Friend; and the Respondent knew that Ashby, Slaten, and Friend were affiliated with the Union.

a. Hally Ashby

Ashby was an applicant for employment, and the Respondent does not contend otherwise. By calling the Respondent in response to its newspaper advertisement, and giving her abilities and work experience to Almond, she did as much as any other applicant who applied for work. She was not given the opportunity for a personal interview and to complete the application process because Jones decided against hiring her.

Jones and the Respondent claim that the only reason he decided against hiring Ashby was because of her failure to sell herself when she telephoned the Respondent's offices. This claim is not credible and is rejected. Moreover, the incredibility of Jones' claim is exacerbated by the circumstances. The Respondent was seeking drywall mechanics. It was not seeking salespersons or spokespersons. It is not credible that in hiring drywall mechanics the Respondent would consider an applicant's ability to "sell" herself as the most important factor, let alone the determinative factor, in deciding whether to hire the applicant. Yet, that is what Jones claims. Jones claims that the only reason he did not hire Ashby was because of her alleged failure to sell herself. Ashby possessed all the necessary skills and tools to be hired for the positions the Respondent was seek-

[22] Jorge Zurita was hired on March 21.

ing to fill. These are skilled positions, but the skill necessary to do the job was a physical or craft skill, not the verbal skill of selling oneself, if indeed that is a skill for this position.

The Respondent imposed no self-promotion qualifications or requirements when it advertised for the positions, and its corporate documents contain no reference to any such qualifications for the position of drywall mechanic. Moreover, there is no reference in the Respondent's records that it imposed or even considered the requirement of selling oneself on any of the applicants, including Ashby. Ashby possessed all of the objective qualifications to be hired by the Respondent. Jones' assertion and use of his alleged, subjective impression of Ashby's self-promotion as the reason and the only reason for his refusal to hire Ashby is a pretext.

An employer's stated reasons for an adverse employment action against an employee[23] can be considered as part of the General Counsel's initial burden, and if those reasons are pretextual, they can support an inference that the employer had an unlawful motive. *Black Entertainment Television*, 324 NLRB 1161 (1997). The entire record may be examined to ascertain whether the adverse employment action was motivated by protected activity. Thus, in determining whether the evidence satisfies the General Counsel's initial burden, consideration is not limited to the evidence introduced by the General Counsel, but can also include the reasons advanced by the Respondent for its action and any additional evidence offered at the hearing by the Respondent. *American Gardens Management Co*., 338 NLRB 644, 645 fn. 5 (2002); *Williams Contracting*, 309 NLRB 433 (1992).

The singular reason advanced by Jones for his refusal to interview and hire Ashby is pretextual. Jones was not motivated by his subjective perception of Ashby's ability to sell herself. Moreover, this alleged perception was not supported by Almond, who spoke to Ashby. Ashby applied immediately after the Respondent's newspaper advertisement, and before other applicants possessing similar objective qualifications were hired. Jones' subjective impression, even if it were true (which it is not), is something that cannot be tested. In any event, Jones' testimony regarding his reason for not hiring Ashby is not credible. Ashby possessed all of the objective qualifications for the job; the Respondent was actively seeking and hiring applicants with similar qualifications as Ashby possessed; and the Respondent was unable to articulate a credible or nonpretextual reason for its refusal to hire Ashby. Accordingly, the Respondent did not establish that it would not have hired Ashby in the absence of her union affiliation. The Respondent violated Section 8(a)(1) and (3) of the Act when it refused to hire Hally Ashby.

b. Edward Slaten

The General Counsel contends that the Respondent deviated from its normal practice when Rodriguez and Truitt failed to contact Jones concerning Slaten's stated interest in a position and otherwise failed to put Slaten in contact with Jones. Relying on *Cheney Construction, Inc*., 344 NLRB No. 9 (2005), the General Counsel maintains that the Respondent's deviation from its normal practice in processing Slaten's expressed interest in a job is evidence of the Respondent's unlawful motivation.

In *Cheney Construction, Inc*., supra, the Respondent's standard practice was to place applications for jobs in the superintendent's box when the Respondent was hiring, and to file applications away when it was not hiring. The receptionist filed the subject applications away despite the fact that the Respondent was hiring. When asked why, she replied that she did so because the applicants were union members and they were not really looking for jobs. The Board held that this response demonstrated antiunion animus. *Cheney Construction, Inc.* is not controlling because there is no direct evidence of antiunion animus in the present case, and the indirect evidence, being the deviation from the Respondent's standard practice, is ambiguous and is, alone, insufficient to establish antiunion animus.

The ambiguity of Rodriguez' and Truitt's action in failing to call Jones or put Slaten in contact with Jones is exacerbated by the fact that the Respondent was not hiring for the two jobsites at which Slaten appeared. Although the Respondent was hiring at another jobsite, the National Business Park, there is no evidence that foremen on other jobsites had the authority to interview applicants for that jobsite or to refer applicants when their own jobsite was not hiring. Of course, Wasilewski was referred to Jones by another foreman during this same general time period when he appeared at a jobsite, but Wasilewski appeared at a jobsite for which the Respondent was hiring, National Business Park.

Despite having been told that Jones made the hiring decisions, Slaten never called Jones to apply for a job. Accordingly, Slaten failed to follow through on applying for a job, and therefore, never became an applicant for a job with the Respondent. Slaten appeared at two jobsites, but he was told at the first jobsite that Jones did the hiring. Thus, Slaten knew before any substantive conversation with Rodriguez or Truitt that Jones made the hiring decisions. Slaten may have assumed that the Respondent was not hiring at any jobsites after he spoke with Rodriguez and Truitt, but he was not told this directly. Slaten elected to not contact Jones after Rodriguez told him that Jones was the person who did the hiring. Slaten could easily have contacted Jones in spite of Rodriguez' failure to volunteer Jones' telephone number. After all, Slaten knew that the Respondent was the employer. Rodriguez gave accurate advice to Slaten that Jones did the hiring. If Slaten sought employment at other jobsites of the Respondent, he should have heeded Rodriguez' advice and contacted Jones. He did not. Accordingly, Slaten was not an applicant.

Nevertheless, and accepting the General Counsel's argument that Slaten was an applicant because he was not obligated to do a futile act by contacting Jones after Rodriguez' and Truitt's comments that the Respondent was not hiring (see *Shortway Suburban Lines, Inc*., 286 NLRB 323, 326 (1987), enfd. 862 F.2d 309 (3d Cir. 1988)), the Respondent has established that it would not have hired Slaten even in the absence of his union

[23] Slaten, Ashby, and Friend were applicants for employment with the Respondent, and accordingly, were "employees" entitled to protection under the Act. *Phelps Dodge v. NLRB*, 313 U.S. 177 (1941). Moreover, assuming the Respondent's factual contention is correct that they were union organizers, their protected status as employees remains intact. *NLRB v. Town & Country Electric, Inc*., 516 U.S. 85 (1995).

affiliation. The evidence demonstrates that the Respondent was not hiring at the Aberdeen or Abingdon jobsites when Slaten appeared at those sites. Rodriguez' and Truitt's comments that the Respondent was not hiring were not shown to be false, or intentionally misleading, or otherwise animated by antiunion sentiments. Rodriguez and Truitt could certainly have been more helpful to Slaten, but the evidence does not reasonably lead to the conclusion that this lack of affirmative assistance was motivated by antiunion animus. The Respondent has established that it would not have hired Slaten (or to use the alleged discriminatory action argued by the General Counsel, the Respondent has established that it would not have offered more affirmative help to Slaten in response to Slaten's inquiries concerning a job) even in the absence of Slaten's union affiliation.

Accordingly, the Respondent did not violate Section 8(a)(1) and (3) in its actions involving Slaten, and this charge should be dismissed.

c. Roy Friend Jr.

In Jones' telephone conversation with Friend, Jones asked Friend if his previous employer was a union company. Jones' log also demonstrates his interest in applicants' union affiliations. After Jones' conversation with Friend, he did not talk to Friend again, and did not hire him. Jones did not explain to Friend why he was interested in Friend's union affiliation, and he did not credibly explain at the hearing why he or the Respondent was interested in any applicant's union affiliation.

Whether a job applicant is a member of a union or has previously worked for union companies is not relevant to the applicant's ability, productivity, or reliability as an employee. An employer may not consider an applicant's union affiliation in deciding whether to hire the applicant. See *Casey Electric, Inc*., 313 NLRB 774 (1994). Jones' unexplained interrogation of Friend regarding his union affiliation suggests that Friend's union affiliation was, at least, a factor in Jones' decision to not offer Friend a job. Indeed, no other purpose comes immediately to mind.

Moreover, Jones' interrogation of Friend constituted a violation of Section 8(a)(1), see infra, which, in turn, supports a finding of antiunion animus. *Greyston Bakery*, 327 NLRB 433 (1999). This inference is more compelling herein because the underlying 8(a)(1) violation involves an inquiry into the union affiliation of the applicant under consideration.

The Respondent denies that Jones asked Friend about the union affiliation of his previous employer, and it claims to have offered Friend a job, which Friend allegedly refused. However, in consideration of the demeanor of the witnesses, Jones' recording of various applicants' union affiliations, Friend's unemployed status and his status as a union member who was involved in the Union's organizing effort, and all of the surrounding circumstances, the Respondent's factual contentions have been and are rejected. Accordingly, the Respondent has not established that it would have hired Friend even in the absence of his union affiliation. Indeed, just the opposite has been established. The Respondent claims to have offered a job to Friend, which it did not do, and it has offered no other credible explanation for its failure to hire Friend.

The Respondent did not offer Friend a job and its failure to do so was based, at least in part, on its perception of Friend's union status. This action is unlawful under Section 8(a)(1) and (3) of the Act.

2. Interrogation of Friend

Interrogation of employees is not unlawful per se. The test for determining whether an unlawful interrogation has occurred is whether, under all the circumstances, the alleged interrogation reasonably tends to restrain, coerce, or interfere with employees in the exercise of rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In making this determination, all of the surrounding circumstances must be considered. Either the words themselves or the context in which they are used must suggest an element of coercion or interference. Id. Relevant circumstances include (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of the interrogation; and (5) the truthfulness of the reply. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Additional factors include whether the employee was given assurances that there would be no reprisals, whether a valid purpose for the question(s) was communicated to the employee, and whether the employee is an open union adherent. *Performance Friction Corp*., 335 NLRB 1117 (2001); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). These factors should not be applied mechanically, and the analysis does not require strict evaluation of each factor. *Medcare Associates, Inc*., 330 NLRB 935 (2000). Nevertheless, the interrogation of a prospective employee seeking employment concerning the employee's attitude about or affiliation with unions is inherently coercive and such questions are clearly irrelevant to the employee's qualifications. *Action Temporary Employment*, 337 NLRB 268 (2001).

The Respondent's field superintendent interrogated Friend, a job applicant, during Friend's interview for a job. The information sought was whether Friend's previous employer was a union contractor. The interrogation also occurred in the context of organizing efforts at the Respondent by Friend's union. No assurances or valid purpose was communicated to Friend. On balance and considering all the circumstances, Jones' interrogation of Friend was coercive and violated Section 8(a)(1) of the Act.

B. Section 8(a)(1) and (3)—Johnny Terrones

1. Threatening statements by Karl Toboll

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. Section 7 guarantees to employees the right to form, join, or assist labor organizations. A violation of Section 8(a)(1) does not depend on the employer's motivation or on the subjective reaction of the employees or on whether the coercion succeeded or failed. *Sunnyside Home Care Project, Inc*., 308 NLRB 346 fn. 1 (1992).

In early March, Karl Toboll told Terrones and the workers with Terrones that five of their coworkers who had recently left the GBMC jobsite would be put on a list and would never again

work for the Respondent because those workers had gone to work for a union contractor. These threats, that departed workers who leave to work with a union will be put on a list and will never again work for the Respondent are, individually and together, coercive and threaten workers for exercising their rights under Section 7 of the Act.

The Respondent argues that Toboll's alleged threat (as well as the interrogations charged as 8(a)(1) violations), even if it occurred, was not successful in actually coercing Terrones and the other employees to refrain from any activities. Of course, one of the insidious characteristics of such violations is the difficulty in accurately measuring their effects. Nevertheless, whether the threats or interrogations succeeded or failed is not an element of the violation. *Sunnyside Home Care Project, Inc*., supra.

Accordingly, for all the foregoing reasons, the threats made by Karl Toboll to Terrones and other workers violate Section 8(a)(1) of the Act.

2. Interrogations by Rodriguez and Stoll

On or about April 22, Terrones wore a union shirt to work at the GBMC jobsite. Rodriguez asked him if the shirt belonged to the Union and if he was a member of the Union. Terrones replied yes. The next day, Terrones again wore a union shirt, together with a hardhat that displayed union stickers. While he was working in the basement of the GBMC building, Stoll approached him, asked him about his union stickers and asked him if he belonged to the Union. Terrones replied yes.

Terrones' open display of union support is a factor that could tend to diminish the coerciveness of Rodriguez' and Stoll's questions. *Rossmore House*, supra. However, Terrones had worn union clothing many times in the past and had never before been asked by a supervisor about the clothing or his union affiliation. Moreover, the present interrogations were conducted during the Union's organizing campaign and were accompanied by disapproving glances from the foremen. And, no assurances against reprisals were given nor was a lawful purpose for the interrogation offered. On balance, and considering all the circumstances, the interrogations reasonably tended to restrain, coerce, and interfere with rights guaranteed by the Act. Accordingly, Rodriguez' and Stoll's interrogations of Terrones about his union affiliation violated Section 8(a)(1) of the Act.

3. Layoff of Terrones

Under the test set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), when the employer is alleged to have violated Section 8(a)(3) in discharging an employee, the General Counsel has the burden of proving by a preponderance of the evidence that antiunion sentiment was a motivating factor in the discharge. To meet this burden, the General Counsel must offer credible evidence of union or other protected activity, employer knowledge of this activity, and the existence of antiunion animus. *Briar Crest Nursing Home*, 333 NLRB 935 (2001). Once such unlawful motivation is shown, the burden shifts to the employer to prove its affirmative defense that the alleged discriminatory discharge would have taken place even in the absence of the protected activity. Id.; *Wright Line*, supra. If the employer's stated motive is found to be false, the circumstances may warrant an inference that the true motive is an unlawful one. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Nevertheless, the employer's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992). The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, supra.

The General Counsel has met his burden of proving that antiunion sentiment was a motivating factor in Terrones' layoff. Terrones engaged in protected activity when he wore union shirts and a hardhat displaying prounion symbols. The Respondent knew of this activity, which is demonstrated by Rodriguez' and Stoll's interrogation of Terrones about the union symbols. Antiunion animus is shown by Toboll's statement to Terrones that five former workers, who he believed had left the Respondent to work for a union company, would be put on a list and never be allowed to work for the Respondent again. Antiunion animus is also demonstrated by the Respondent's 8(a)(1) violations. *Greyston Bakery*, supra.

The Respondent contends that it would have discharged Terrones in the absence of his protected activity, that it was downsizing its workforce at the GBMC jobsite in the spring, and that it selected Terrones for layoff because he had been absent from work on a number of occasions.

The work force at the GBMC jobsite decreased from approximately 77 to 40 in the spring. However, only about 15 workers were actually laid off; the remaining workers were transferred to other jobs. Moreover, notwithstanding these layoffs, the Respondent continued to employ workers who had attendance problems at work and whose personnel files reflect such problems. On the other hand, Terrones' personnel file does not reflect any attendance problems or issues.

When Jones selected Terrones for layoff, Terrones was selected from the list of workers at the GBMC jobsite on the particular day that Jones appeared. Thus, the list was a random list composed only of workers who happened to be on the jobsite on that particular day. The selection of Terrones for layoff, allegedly because of attendance problems, reflects such arbitrariness or deliberateness. As noted, after laying off Terrones, the Respondent continued to employ workers whose personnel files reflected attendance problems, whereas Terrones' file reflected no such problems. In addition, after laying off Terrones, the Respondent continued to employ at the GBMC jobsite at least three workers whose attendance records were worse than Terrones. Also, the reason Terrones had missed several days of work (34.5 hours) during March and April would not recur because his child had been born, and Jones knew that his child had been born.

An employer's failure to conduct a full and fair investigation of an employee's alleged misconduct may be evidence of discriminatory intent. *Firestone Textile Co*., 203 NLRB 89, 95 (1973). The Respondent claims that Terrones was selected for layoff because of attendance problems. However, a full and fair investigation by the Respondent would have disclosed that other workers could have and should have been selected before

Terrones, and that all workers were not considered for layoff, without regard to their experience or performance.

Disparate treatment of the discharged employee is another factor from which animus may be inferred. E.g., *Lampi LLC*, 327 NLRB 222 (1998). Jones offered plausible reasons why the other workers who had attendance problems were not selected for layoff. But his explanations do not address the arbitrary method in which he chose to select Terrones. Since the only criterion used by Jones for being eligible for layoff was being present at the jobsite on the date Jones appeared at GBMC, then the particular qualifications of any missing workers on that day simply did not matter. Moreover, if attendance at work were the only reason for which a worker was selected for layoff, the Respondent would not have selected Terrones, but would have selected other workers with worse attendance records or with attendance problems reflected in their personnel files. In addition, if attendance were the only reason for the layoff, the Respondent would likely have considered the attendance of all its workers, or at least all the workers on the GBMC jobsite. It did not. Accordingly, the evidence in this case shows that, even if attendance were a factor, there was at least one additional factor, a factor that tipped the scales against Terrones.

Moreover, the Respondent not only treated Terrones disparately with respect to his coworkers, but also with respect to how it had treated him in the past. The Respondent had employed Terrones for 13 months. During that time, the Respondent had transferred Terrones to other jobsites four times. Terrones had been laid off only one time (although the Respondent denies that Terrones had ever been laid off), but this was done with Terrones' knowledge that the layoff would be for a brief and defined period of time. The Respondent's practice of transferring Terrones from job to job is in keeping with its opinion and belief that Terrones was a good worker. This practice abruptly changed in April 2004, which was during the Union's organization drive and shortly after the Respondent's foremen noticed, for the first time, Terrones wearing clothing with the Union's insignia.

Shifting explanations for an employment action may provide evidence of unlawful motivation. *U.S. Coachworks, Inc*., 334 NLRB 955, 957 (2001). Terrones was not told either by Stoll or by Jones that he was being laid off because of his attendance problems. The only reason given by Stoll to Terrones was that there was no more work for Terrones. Jones gave Terrones no reason for the layoff. Thus, the only reason given to Terrones by the Respondent dealt with the alleged lack of work. The Respondent presently claims that the reason Terrones was selected for layoff was his alleged attendance problems. If that were true, it is likely that either or both Stoll and Jones would have told Terrones this reason for the layoff. Moreover, the Respondent's shift in its explanation for Terrones' layoff is further evidence of animus.

Despite the conclusion that the Respondent violated Section 8(a)(1) and (3) by laying off Terrones, I hasten to add that merely because an employer does not discharge the employee with the worst attendance record, when laying off another worker solely because of attendance problems, does not, by that fact alone, establish that the employer harbored an unlawful motivation. As noted above, the reason for laying off Terrones, which was asserted by the Respondent at the hearing, is plausible. Accordingly, additional evidence of the Respondent's motivation would generally be required, and has been provided in this case by the General Counsel and by the evidence. Moreover, the Respondent has not established that it would have taken the same action in the absence of Terrones' union affiliation and sympathies. Accordingly, the Respondent violated Section 8(a)(1) and (3) when it discharged Terrones in April 2004.

The complaint charges that the Respondent has refused to reinstate Terrones. (Complaint par. 10.) This aspect of the charge has not been proven. When Stoll notified Terrones of his layoff, he told Terrones that he should call Jones in a couple of weeks to see if there was any work available at that time. In spite of this instruction and advice, Terrones called Jones several days after his layoff, and asked if there was any work. Jones replied that there was nothing for the time being. Terrones did not attempt to contact the Respondent again. The evidence does not establish whether Jones was untruthful when he told Terrones there was no work for the time being. If Jones was truthful, it seems to follow that the Respondent did not refuse to reinstate Terrones. Moreover, Terrones failed to follow Stoll's instructions in reapplying for work. Of course, the Respondent should not be permitted to impose unreasonable conditions on a former employee's reapplying for work, especially when the employee was unlawfully discharged in the first place. However, with the GBMC job winding down, a 2-week hiatus seems reasonable to allow new work to develop. Under the circumstances, Stoll's instructions were reasonable, and Terrones failed to follow those instructions.

In any event, whether the Respondent later refused to reinstate Terrones does not affect its violation of Section 8(a)(3) for discriminatorily laying off Terrones in the first instance. The Respondent's violation of law was complete when it discharged Terrones, without regard to whether it later refused to reinstate him.

CONCLUSIONS OF LAW

1. Centerline Construction Company (the Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Mid-Atlantic Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (the Union or the Charging Party) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by interrogating an applicant for employment about the applicant's union affiliation, by interrogating an employee about the employee's union affiliation, and by threatening employees who it believed had left the Respondent's employment to work for a union contractor.

4. The Respondent violated Section 8(a)(1) and (3) by unlawfully refusing to hire Hally Ashby and Roy Friend Jr., and by unlawfully laying off Johnny Terrones.

5. The foregoing violations constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully refused to hire applicants Hally Ashby and Roy Friend Jr. as drywall mechanics, the Respondent will be ordered to offer the applicants positions as drywall mechanics, and to make these applicants whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent unlawfully discharged Johnny Terrones, the Respondent will be ordered to offer him reinstatement and make him whole for any loss of earnings and other benefits in accordance with *F. W. Woolworth Co*., supra, plus interest in accordance with *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Centerline Construction Company, Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating applicants for employment concerning their affiliation with a union.

(b) Interrogating employees concerning their affiliation with a union.

(c) Threatening employees because of their union activity.

(d) Failing and refusing to consider for hire, and refusing to hire, job applicants on the basis of their union affiliation or other protected activities.

(e) Discharging or otherwise discriminating against any employee on the basis of the employee's union affiliation or other protected activity.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, the Respondent shall offer immediate employment to Hally Ashby and Roy Friend Jr. without prejudice to the discriminatees' seniority or any other rights or privileges they would have enjoyed had the Respondent hired them when they applied. If the positions for which these discriminatees should have been hired no longer exist, the Respondent shall offer them immediate employment in a substantially equivalent position without prejudice to their seniority or any other rights or privileges they would have enjoyed had the Respondent hired them when they applied.

(b) Make Hally Ashby and Roy Friend Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful refusal to hire Hally Ashby and Roy Friend Jr., and within 3 days thereafter notify the applicants in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(d) Within 14 days from the date of the Board's Order, offer Johnny Terrones full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Johnny Terrones whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Johnny Terrones in writing that this has been done and that the discharge will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Baltimore, Maryland, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, San Francisco, CA June 30, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire or fail and refuse to consider for hire job applicants on the basis of their union affiliation or other protected activity.

WE WILL NOT discharge or otherwise discriminate against any employee on the basis of the employee's union affiliation or other protected activity.

WE WILL NOT question applicants for employment or employees concerning their affiliation with Mid-Atlantic Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America or any other labor organization.

WE WILL NOT threaten employees who leave our employment to work for a union contractor.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer employment to Hally Ashby and Roy Friend Jr. to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

WE WILL make Hally Ashby and Roy Friend Jr. whole for all losses suffered as a result of our failure and refusal to hire them, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer Johnny Terrones full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Johnny Terrones whole for all losses suffered as a result of his unlawful layoff, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful failure and refusal to hire Hally Ashby and Roy Friend Jr., and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the failure and refusal to hire them will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful layoff of Johnny Terrones, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the layoff will not be used against him in any way.

CENTERLINE CONSTRUCTION COMPANY